

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA, ) 3:93-cr-00091-HDM-VPC  
11 Plaintiff, )  
12 vs. ) ORDER  
13 CARLOS RIOS-HERNANDEZ, )  
14 Defendant. )

15 Before the court is the defendant's motion to dismiss the  
16 indictment (#217).

18 On October 20, 1993, an indictment was issued charging  
19 defendant Carlos Rios-Hernandez ("defendant") with various drug  
20 trafficking crimes. On March 11, 1994, a jury found defendant  
21 guilty on all counts. On September 14, 1994, the court sentenced  
22 defendant and entered its judgment of conviction. Defendant  
appealed the conviction, and the Ninth Circuit affirmed.

24 On April 7, 1997, the defendant filed a motion to vacate  
25 pursuant to 28 U.S.C. § 2255 (#184). The court denied defendant's  
26 motion and denied a certificate of appealability (#189, #194). The  
27 Ninth Circuit also denied defendant a certificate of appealability  
(#196).

1       On September 9, 2013, the defendant moved to dismiss the  
2 indictment.

3       In general, a motion to dismiss the indictment must be filed  
4 before trial. Fed. R. Crim. P. 12(b) (3). However, "at any time  
5 while the case is pending, the court may hear a claim that the  
6 indictment or information fails to invoke the court's jurisdiction  
7 or to state an offense." *Id.* Here, defendant argues that the  
8 indictment failed to state an offense on the grounds that it failed  
9 to give notice of the type and quantities of drugs. Although the  
10 court could consider such an assertion while the defendant's case  
11 remains "pending," several courts have held that a case is no  
12 longer "pending" within the meaning of Rule 12(b) after the  
13 judgment becomes final. See *United States v. Wellons*, 289 F. App'x  
14 383, 384 (11th Cir. 2008) (unpublished disposition) (motion to  
15 dismiss filed seven years after judgment became final was properly  
16 denied); *United States v. Felder*, 220 F. App'x 951, 952 (11th Cir.  
17 2007) (unpublished disposition) (district court was without subject  
18 matter jurisdiction to consider motion to dismiss indictment filed  
19 thirteen years after the Supreme Court denied petition for  
20 certiorari); *United States v. Preciado- Quinonez*, 53 F. App'x 6, 7  
21 (10th Cir. 2002) (unpublished disposition) ("We have repeatedly  
22 held that a motion to dismiss an indictment, pursuant to Fed. R.  
23 Crim. P. 12(b) (2), must be filed before final judgment; after that  
24 time a pleading challenging the adequacy of an indictment is  
25 properly deemed a § 2255 motion."). Defendant's judgment has been  
26 final for at least seventeen years. (See Doc. #157). His motion  
27 to dismiss the indictment is therefore untimely, and the  
28 court may not consider it.

1 Defendant's motion could be construed as a motion to vacate  
2 under 28 U.S.C. § 2255. See *id.*; *United States v. Nelson*, 177 F.  
3 Supp. 2d 1181, 1188-89 (D. Kan. 2001). However, as defendant has  
4 filed a § 2255 motion once before, the instant motion would be  
5 second or successive. The court may not consider a second or  
6 successive § 2255 motion absent a certificate from the Court of  
7 Appeals authorizing it to do so. 28 U.S.C. § 2255(h); *id.* § 2244;  
8 *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011).  
9 No such certificate has been filed in this case. Accordingly, as  
10 the Ninth Circuit has not authorized the filing of a second or  
11 successive § 2255 petition in this case, this court is without  
12 jurisdiction to consider defendant's motion to the extent it may be  
13 construed as a § 2255 petition.

14 The defendant's motion to dismiss the indictment (#217) is  
15 **DENIED** as untimely. To the extent defendant's motion is considered  
16 a § 2255 petition, the petition is dismissed.

17 || IT IS SO ORDERED.

18 DATED: This 10th day of September, 2013.

Howard D. McKibbin

UNITED STATES DISTRICT JUDGE